CHOO TECK SOON v. PUBLIC PROSECUTOR.

[A. Cr. J. (Wilson, J.) November 27, 1953]

[K.L. — Criminal Appeal No. 94 of 1953]

Dangerous Drugs Ordinance, 1952 — Possession of chandu — Presumption under s. 37(d) and (g) — Onus of proof of knowledge — Admissibility — Court has no jurisdiction to amend recorded sentence in the absence of accused.

A tin containing opium was found in the luggage boot of the motor car of which the appellant was the owner. On being questioned by the Inspector as to what was inside the tin, the appellant was alleged to have replied chandu. The learned President considered whether there was a presumption against the appellant under paragraph (d) or (g) of section 37 of the Dangerous Drugs Ordinance. But he did not feel that it was necessary to come to a conclusion, presumably as a result of the admission in the evidence of the statement of the appellant. The record showed that the appellant was convicted and sentenced to a fine of $5,000 and six months' imprisonment, but after the case and in the absence of the appellant the learned President fixed the period in default of fine (which he overlooked at the time of sentencing the appellant) as twelve months.

Held: the reply of the appellant was inadmissible under section 113(iii) of the Criminal Procedure Code, and section 27 of the Evidence Ordinance, 1950, did not apply in this instance; (2) no presumption under section 37(g) of the Dangerous Drugs Ordinance can arise because a car does not constitute "premises" within the meaning of the Ordinance; (3) the presumption under section 37(d) can only arise after it has been proved that the appellant knew what was the contents of the tin. The onus of proving this is on the prosecution; (4) the learned President had no jurisdiction to amend the recorded sentence in absence of the accused.

[**Editorial Note:** See however **Public Prosecutor v. Ong Chang Sow** reported at p. 82 in this issue where Thomson, J. held that the case of **Ho Seng Seng v. Rex**(1) is not an authority in the Federation of Malaya.]

Cases referred to:—

(1) *Ho Seng Seng v. Rex* (1951) M.L.J. 225.

(2) *B. R. Lawrence v. The King* (1933) A.C. 699.

CRIMINAL APPEAL.

K. Chelvanayagam for the appellant.

B. G. Smith (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Wilson, J.: — In this case the appellant was convicted of being in possession of raw opium. The evidence was that, as a result of information received, the police went to a house in Tanjong Sepat. The house in which the appellant was staying was searched but nothing was found. This took place in the early hours of the morning. On leaving the house Inspector Isa bin Haji Hassan saw a motor car in front of the house about 18 feet from the window. He asked the appellant who was the owner of the car and the appellant said that he was. The Inspector searched the car in the presence of the appellant and in the luggage boot, which apparently was open, he found a tin. Subsequently, a Government chemist certified that the contents of the tin were 16 slabs of raw opium.

The Inspector in his evidence stated that when he found the tin he asked the appellant "what is inside that?" Mr. Chelvanayagam who appeared for the appellant objected to this question on the grounds that it was not admissible by reason of section 113 of the Criminal Procedure Code. The objection was overruled and the alleged reply of the appellant was recorded. The reply was chandu.

The learned President in his grounds of judgment states that he considered section 113 of the Criminal Procedure Code and decided that the alleged statement by the appellant was admissible in evidence by reason of section 113(iii) of the Criminal Procedure Code and section 27 of the Evidence Ordinance because, in his view, the appellant was in custody within the meaning of section 27 of the Evidence Ordinance.

I very much doubt whether the appellant was in custody but it is not necessary to decide that point for the purposes of this case. Section 27 of the Evidence Ordinance states that "when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether such information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved." I very much doubt whether it can be said that the opium was discovered as a result of information received from the appellant. However that may be, assuming that the opium was discovered as a result of such information and assuming the appellant was in the custody of a police officer before his answer to the question put by the Inspector could be admitted in evidence it was necessary to show also that he was a person accused of an offence. Quite clearly, from the kind of questions that were put to him he was not a person accused of any offence. In these circumstances I find that his reply to the police officer's question was inadmissible in evidence.

It is therefore necessary to consider whether there was any evidence on which the appellant could have been convicted if his statement had not been admitted in evidence. At the close of the case for the prosecution there was a submission that there was no case to answer. The learned President considered whether there was a presumption against the appellant under paragraph (d) or (g) of section 37 of the Dangerous Drugs Ordinance. He did not feel that it was necessary to come to a conclusion, presumably as a result of the admission in evidence of the statement of the appellant which I find to have been inadmissible.

In these circumstances it is necessary to consider whether there was any presumption against the appellant. The Deputy Public Prosecutor has conceded that there was no such presumption. Paragraph (g) of section 37 relates to a dangerous drug concealed in any premises and provides that "it shall be presumed that the drug is concealed with the knowledge of the occupier of the premises." In this case the drug was found in a motor car and I am satisfied that a motor car does not constitute "premises" within the meaning of the Dangerous Drugs Ordinance.

Paragraph (d) referred to above raises a presumption that a person who is found to have had in his custody or under his control a dangerous drug shall be deemed, until the contrary is proved, to have been in possession of such drug. In this connection I would refer to the case of *Ho Seng Seng v. Rex*[1]. In that case the appellant was found carrying a basket containing one large paper parcel and one small. The large parcel contained opium. The defence was that the basket had been handed to the appellant by another person who is named, and that he, the appellant, did not know the contents of the basket. The learned District Judge took the view that the onus was upon the appellant to prove that he did not know what were the contents of the basket. The learned Acting Chief Justice of Singapore held, on appeal, that the onus was upon the prosecution to prove to the satisfaction of the Court that the appellant knew that a dangerous drug was in the basket. In my opinion, in this case under appeal, the onus was on the prosecution to show that the appellant knew what was in the tin found in his motor car. As I have already said, I find that his own statement as to the contents of the tin were inadmissible in evidence. In my view there is no other evidence to show that the appellant knew what was in the tin. The chandu was found in the boot of a car parked outside the house in which the appellant had spent the night. There is no evidence that the boot of the car was locked and indeed it would seem that it was not. A search was made on information received from some informer. There is no evidence that the tin was in the car at the time the car was parked and it is obvious that any person who so desired could have planted the tin of chandu there during the night. In these circumstances the appeal must succeed and the conviction and sentence be quashed.

There is one other matter to which I think I should refer, although it is not necessary for me to give any decision as I have decided to quash the conviction. The record shows that the sentence imposed in open Court was a fine of $5,000 and six months' imprisonment. The President has informed me that he overlooked the necessity for a term of imprisonment in default of payment of the fine but that immediately after the case in the absence of the appellant he fixed the period in default as twelve months' imprisonment.

The appellant says that he was sentenced to a fine of $5,000 or in default six months' imprisonment on the 28th August. He states in his affidavit that he received a letter dated the 29th August informing him that his sentence was $5,000 or twelve months' imprisonment and six months' imprisonment. I must accept that the original sentence was a fine of $5,000 and six months' imprisonment. In connection with the subsequent alteration of the sentence in the absence of the appellant I would draw attention to the case of *B. R. Lawrence v. The King*[2], in which the Privy Council held that a Judge has no jurisdiction after the discharge of the jury and in the absence of the accused to alter the sentence recorded at the trial. It may well be that if the matter were fully argued it could be contended that that decision has no application to what happened in this case. Nevertheless I would express the opinion that the learned President had no jurisdiction to amend his recorded sentence in the absence of the accused. I express no view as to whether or not the learned President could have sent for the convicted person either as soon as he discovered his error or in the event of a failure to pay the fine in a reasonable time and impose a term of imprisonment in default of payment in his presence. He could of course have issued a warrant of distress if the fine was not paid.

The appeal is allowed and the conviction and sentence are quashed.

Appeal allowed.

Solicitor for the appellant: *K. Chelvanayagam.*

HEAP TONG HOE & CO. v. YEW SIEW TUAN.

[O. C. J. (Spenser Wilkinson, J.) February 5, 1954]
[Penang — Originating Motion No. 24 of 1953]

Landlord and tenant — Control of Rent Ordinance, 1948, ss. 8(1)(d) & 13(1)(m) — Rent Assessment Board — Jurisdiction of — Certiorari.

This was an application for an order of certiorari to remove into the High Court and quash a certificate issued by the Rent Assessment Board on the ground that the Board had no jurisdiction to issue a certificate under the provisions of sections 8(1)(d) and 13(1)(m) of the Control of Rent Ordinance; 1948, in favour of someone who was not the owner of the building. The evidence disclosed that the owner of the actual building known as No. 9 Fish Lane was not the owner of the land upon which it is erected. Part of the order of the Board read as follows:—

> "The Board is satisfied that the applicant as the owner of the land on which is erected the premises known as No. 9 Fish Lane, Penang, but of which the respondents are the owners, intends to demolish them for the purpose of re-building."